No. 82-1828

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We briefly reply to the contention advanced by respondent Northern Plains Resource Council ("NPRC") that the government's petition for a writ of certiorari in this case was filed out of time.

1. The chronology of the proceedings in the court of appeals was as follows: On March 1, 1982, the court of appeals entered an order (Pet. App. 1a-4a) holding the Environmental Protection Agency liable for attorneys' fees under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. V) 7607(f). Plainly, this was not a final judgment because the court allowed NPRC 14 days in which to specify the size of its requested fee award and allowed EPA a like period of time in which to file an opposition (Pet. App. 4a). In April 1982, the parties agreed that $15,000 was a reasonable fee, but they further stipulated that EPA was reserving its right

to seek further review on the underlying question of NPRC's entitlement to fees. NPRC asked the court of appeals to enter an award of attorneys' fees that embodied the parties' stipulation. Thereafter, the court of appeals took no action in the matter. By letter dated July 12, 1982 (Pet. App. 6a-7a), counsel for NPRC inquired about the status of the matter, but the court did not respond. Because the case was still pending without entry of a final judgment, the government, by motion dated October 25, 1982, asked the court of appeals to stay the entry of final judgment pending this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242 (argued Apr. 25, 1983). On March 3, 1983, the court of appeals denied the government's motion and ordered EPA to pay NPRC $15,000 in attorneys' fees (Pet. App. 5a). As we explain below, it was not until entry of the court's order of March 3, 1983, that there was even arguably a final judgment from which review could be sought.

2. It has long been settled that an order establishing liability is not final until the amount of damages has been determined. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71-72 (1948); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). This rule applies with equal force to judgments awarding attorneys' fees. *Crowder* v. *Telemedia, Inc.*, 659 F.2d 787, 788 (7th Cir. 1981); *Cassidy* v. *Virginia Carolina Veneer Corp.*, 652 F.2d 380, 383 (4th Cir. 1981); *Equal Employment Opportunity Commission* v. *St. Louis-San Francisco Ry.*, 651 F.2d 718, 719 (10th Cir. 1981); *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1140 (8th Cir.), cert. denied, 454 U.S. 969 (1981); *Williams* v. *Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976).[1]

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[1]The application of this rule to judgments for attorneys' fees was implicitly recognized by this Court in *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980). The Court indicated that judgment against Boeing was final because it held Boeing liable for a fixed amount. Pending claims

We fully accept the rule that a judgment on the merits is final and appealable even though a claim for attorneys' fees has not been decided. *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131, 133 (6th Cir. 1980); *Hidell* v. *International Diversified Investments*, 520 F.2d 529, 532 n.4 (7th Cir. 1975). But, as this Court has noted, this rule simply recognizes the collateral nature of claims for attorneys' fees. *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 452 n.14 (1982). See also *Halderman* v. *Pennhurst State School & Hospital*, 673 F.2d 628, 644 (3d Cir.) cert. granted on other grounds, 457 U.S. 1131 (1982); *Goodman* v. *Heublein, Inc.*, 682 F.2d 44, 47 (2d Cir. 1982). It does not follow that where the only question contested is the collateral issue of attorneys' fees, an order establishing liability for such fees becomes final before the amount of that liability is determined.[2]

In the instant case, therefore, it is clear that the court of appeals' order of March 1, 1982, was not final; the court itself contemplated and called for further submissions from the parties on the amount of liability. The fact that the parties ultimately reached agreement on the amount of liability is of no consequence; clearly, the parties lack authority to turn an interlocutory order into a final judgment through the submission of a *proposed* judgment. Only the court of appeals itself could give the parties' stipulation the finality necessary for further review, and the court did not do so until March 3, 1983.

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for attorneys' fees did not preclude finality because they would be paid out of the damages already assessed against Boeing; Boeing's total liability would not be affected (444 U.S. at 479-480 n.5).

[2]None of the cases cited by NPRC (Br. in Opp. 4-5 & n.3) is apposite here because none involved interlocutory determinations of liability prior to the establishment of damages. As we have shown above, it is the uniform rule in the courts of appeals that attorneys' fee awards do not become final until the amount of the award is fixed.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242.

Respectfully submitted.

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